

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

HEATH VINCENT FULKERSON,

Case No.: 3:19-cv-00721-MMD-WGC

Plaintiff,

# Report & Recommendation of United States Magistrate Judge

V.

Re: ECF Nos. 1, 1-1

STATE OF NEVADA, et. al.,

## Defendants.

This Report and Recommendation is made to the Honorable Miranda M. Du, Chief United District Judge. The action was referred to the undersigned Magistrate Judge pursuant to S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

Plaintiff has filed an application to proceed in forma pauperis (IFP) (ECF No. 1) and pro se complaint (ECF No. 1-1).

## **I. IFP APPLICATION**

A person may be granted permission to proceed IFP if the person “submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant’s belief that the person is entitled to redress.” 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating that 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner actions).

The Local Rules of Practice for the District of Nevada provide: "Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The

1 application must be made on the form provided by the court and must include a financial affidavit  
 2 disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1.

3 "[T]he supporting affidavits [must] state the facts as to [the] affiant's poverty with some  
 4 particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)  
 5 (quotation marks and citation omitted). A litigant need not "be absolutely destitute to enjoy the  
 6 benefits of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

7 A review of the application to proceed IFP reveals Plaintiff cannot pay the filing fee;  
 8 therefore, the application should be granted.

9 **II. SCREENING**

10 **A. Standard**

11 "[T]he court shall dismiss the case at any time if the court determines that-- (A) the  
 12 allegation of poverty is untrue; or (B) the action or appeal-- (i) is frivolous or malicious; (ii) fails  
 13 to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant  
 14 who is immune from such relief." 28 U.S.C. § 1915(e)(2)(A), (B)(i)-(iii).

15 Dismissal of a complaint for failure to state a claim upon which relief may be granted is  
 16 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) tracks  
 17 that language. As such, when reviewing the adequacy of a complaint under this statute, the court  
 18 applies the same standard as is applied under Rule 12(b)(6). *See e.g. Watison v. Carter*, 668 F.3d  
 19 1108, 1112 (9th Cir. 2012) ("The standard for determining whether a plaintiff has failed to state a  
 20 claim upon which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule  
 21 of Civil Procedure 12(b)(6) standard for failure to state a claim."). Review under Rule 12(b)(6) is  
 22 essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723  
 23 (9th Cir. 2000) (citation omitted).

1 The court must accept as true the allegations, construe the pleadings in the light most  
2 favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen*, 395  
3 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are "held to less stringent  
4 standards than formal pleadings drafted by lawyers[.]" *Hughes v. Rowe*, 449 U.S. 5, 9 (1980)  
5 (internal quotation marks and citation omitted).

6 A complaint must contain more than a "formulaic recitation of the elements of a cause of  
7 action," it must contain factual allegations sufficient to "raise a right to relief above the speculative  
8 level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading must contain  
9 something more ... than ... a statement of facts that merely creates a suspicion [of] a legally  
10 cognizable right of action." *Id.* (citation and quotation marks omitted). At a minimum, a plaintiff  
11 should include "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570; *see*  
12 *also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

13 A dismissal should not be without leave to amend unless it is clear from the face of the  
14 complaint that the action is frivolous and could not be amended to state a federal claim, or the  
15 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d  
16 1103, 1106 (9th Cir. 1995); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

## 17 **B. Plaintiff's Complaint**

18 The caption of Plaintiff's complaint names the State of Nevada, the City of Reno, the City  
19 of Sparks, and the Nevada National Guard, but then goes on to list additional defendants Nevada  
20 Governor Steve Sisolak, Reno Mayor Hillary Schieve, and Sparks Mayor Ron Smith. (ECF No.  
21 1-1 at 1-3.)

22 Plaintiff alleges that state and local officials are responsible for depriving him and his  
23 family from the protection of their freedom to live and participate in civil and political life and

1 society without discrimination or repression. (*Id.* at 3.) He goes on to allege that they have  
2 manipulated the "PUCN" and re-directed his family's communications on their cellular and home  
3 phones, filtered internet access. He also mentions that his homes have been burglarized numerous  
4 times, and while they were reported, they were not investigated. He goes on to assert that there has  
5 been vandalism to vehicles, phones have been hacked, and insurance claims defrauded.

6 42 U.S.C. § 1983 provides a mechanism for the private enforcement of substantive rights  
7 conferred by the Constitution and federal statutes. Section 1983 "is not itself a source of  
8 substantive rights, but merely provides a method for vindicating federal rights elsewhere  
9 conferred." *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (internal quotation marks and citation  
10 omitted). To state a claim under section 1983, a plaintiff must allege: (1) his or her civil rights  
11 were violated, (2) by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48-  
12 49 (1988). To adequately plead the section 1983 elements, a complaint must identify what  
13 constitutional right each defendant violated, and provide sufficient facts to plausibly support each  
14 violation. *See e.g., Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002) (noting defendants must  
15 personally participate in misconduct to be liable under section 1983). The "threshold inquiry in a  
16 § 1983 suit" requires courts "to 'identify the specific constitutional right' at issue." *Manuel v. City*  
17 *of Joliet*, 137 S.Ct. 911, 920 (2017) (citing *Albright*, 510 U.S. at 271). "After pinpointing that right,  
18 courts still must determine the elements of, and rules associated with, an action seeking damages  
19 for its violation." *Id.* (citing *Carey v. Piphus*, 435 U.S. 247, 257-58 (1978)).

20 First, the State of Nevada and the Nevada National Guard are not persons that may be sued  
21 under section 1983, and furthermore, they may not be sued in federal court because of sovereign  
22 immunity under the Eleventh Amendment. *See Will v. Michigan Dep't of State Police*, 491 U.S.  
23

1 58 (1989); U.S. Const. amend XI. Therefore, the State of Nevada and Nevada National Guard  
2 should be dismissed with prejudice.

3 Second, Plaintiff only sues the Governor in his official capacity. Governor Sisolak may not  
4 be sued in his official capacity for damages. *See Kentucky v. Graham*, 473 U.S. 159 (1985); *Will*,  
5 491 U.S. at 71. Plaintiff does not allege that he is suing for injunctive relief; therefore, there is no  
6 basis for suit against Governor Sisolak under section 1983.

7 Local governments may be sued under section 1983 for damages, declaratory and  
8 injunctive relief. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). "[M]unicipalities may be  
9 liable under § 1983 for constitutional injuries pursuant to (1) an official policy; (2) a pervasive  
10 practice or custom; (3) a failure to train, supervise, or discipline; or (4) a decision or act by a final  
11 policymaker." *Horton v. City of Santa Maria*, 915 F.3d 592, 602-03 (9th Cir. 2019) (citation  
12 omitted). "A municipality may not, however, be sued under a *respondeat superior* theory." *Id.* "A  
13 plaintiff must therefore show "deliberate action attributable to the municipality [that] directly  
14 caused a deprivation of federal rights." *Id.* (citation omitted) (emphasis original).

15 Plaintiff has not adequately pled factual allegations that give rise to any plausible claim for  
16 relief against the City of Reno or the City of Sparks, *i.e.*, he has not set forth which constitutional  
17 right each defendant violated, and provided sufficient facts to plausibly support each asserted  
18 violation. Furthermore, he does not include factual allegations that would subject these  
19 municipalities to liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978) and  
20 subsequent cases governing municipal liability. Therefore, the City of Reno and City of Sparks  
21 should be dismissed.

22 ///

1 Plaintiff only sues Mayor Schieve and Mayor Smith in their official capacities. This is the  
2 same as a suit against the local government itself. *See Brandon v. Holt*, 469 U.S. 464  
3 (1985). Therefore, Mayor Schieve and Mayor Smith should be dismissed as well.

4 It is not entirely clear whether Plaintiff could amend to state some colorable claim against  
5 the Cities of Reno and Sparks. Therefore, the dismissal against those defendants should be with  
6 leave to amend.

7 **III. RECOMMENDATION**

8 IT IS HEREBY RECOMMENDED that the District Judge enter an order:

9 (1) **GRANTING** Plaintiff's IFP application (ECF No. 1). Plaintiff is permitted to maintain  
10 this action without prepaying the filing fee or giving security therefor. This order granting  
11 IFP status does not extend to the issuance of subpoenas at government expense.

12 (2) The complaint (ECF No. 1-1) should be **FILED**.

13 (3) The action should be **DISMISSED WITH PREJUDICE** as to the State of Nevada,  
14 Nevada National Guard and Governor Steve Sisolak, and **DISMISSED WITHOUT  
15 PREJUDICE AND WITH LEAVE TO AMEND** as to defendants City of Reno, City of  
16 Sparks, Mayor Schieve, and Mayor Smith (however, to the extent he elects to file an  
17 amended complaint as to the Cities of Reno and Sparks, Mayors Schieve and Smith need  
18 not be named in their official capacities).

19 (4) Plaintiff should be given 30 days from the date of any order adopting and accepting  
20 this Report and Recommendation to file an amended complaint correcting the deficiencies  
21 noted above. The amended complaint must be complete in and of itself without referring  
22 or incorporating by reference any previous complaint. Any allegations, parties, or requests  
23 for relief from a prior complaint that are not carried forwarded in the amended complaint

1 will no longer be before the court. Plaintiff shall clearly title the amended pleading as  
2 “AMENDED COMPLAINT.” Plaintiff should be advised that if he fails to file an amended  
3 complaint within the 30 days, the action may be dismissed.

4 The Plaintiff should be aware of the following:

5 1. That he may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to  
6 this Report and Recommendation within fourteen days of being served with a copy of the Report  
7 and Recommendation. These objections should be titled “Objections to Magistrate Judge’s Report  
8 and Recommendation” and should be accompanied by points and authorities for consideration by  
9 the district judge.

10 2. That this Report and Recommendation is not an appealable order and that any notice of  
11 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed  
12 until entry of judgment by the district court.

13 Dated: December 17, 2019.

14 

15 William G. Cobb  
16 United States Magistrate Judge